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## UNIFORM COMMERCIAL CODE SECTION

### A FOREWORD TO THE STUDY OF THE UNIFORM COMMERCIAL CODE

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By the late years of the nineteenth century, the development of American law had produced a number of important conflicts in the laws of the various states which were needless handicaps to the burgeoning national economy and to the orderly administration of law. Increasing pressure for national legislation to resolve many of the problems created induced the Governors of the states, in the final decade of the century, to create the National Conference of Commissioners on Uniform State Laws. The members of this Conference are appointed by the Governors; it is their job to promulgate legislation for enactment in all states to resolve problems which appear to require uniform treatment. The statutes which they have promulgated now fill fifteen volumes.

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Much of the work of the Conference has been in the field of commercial law. This has been so for several reasons. There is a need for certainty in the rules governing commercial transactions which make legislative codification particularly appropriate to this field of law. Further, with the growth of the national economy and the number of interstate transactions, there is special need for uniformity among the states. And also, the rules are much like the rules of the road: with some exceptions, the common notions of justice are inapplicable and it is important only that the rules be clearly defined and understood by the merchants who are controlled by them. Hence, there are very few occasions for any strong local policy or concept of justice to outweigh the advantages of uniformity.

The first major project of the Conference was the Uniform Negotiable Instruments Law which was promulgated in 1896. It was prepared by Commissioner Crawford of New York and was ultimately adopted in every state. In 1906, the Conference promulgated the Uniform Sales Act and the Uniform Warehouse Receipts Act, both drafted by Professor Williston. The Uniform Bills of Lading Act and the Uniform Stock Transfer Act were promulgated in 1909, the Uniform Conditional Sales Act in 1918, and the Uniform Trust Receipts Act in 1933. To somewhat varying degrees, all of these statutes found acceptance; most of them were enacted in Wyoming. All of these statutes were, however, drafted by one or a few lawyers or scholars with very little outside consultation; it is therefore not surprising that many ambiguities and other minor defects in draftsmanship appeared when the statutes were put to use. Conflicting interpretations by the courts of different states soon impaired the uniformity of the acts and created uncertainty as to the law of states where the disputed questions were not resolved. It was also discovered that there were internal inconsistencies between the various uniform acts themselves.

There has never been any substantial doubt but that the uniform acts promulgated by the Conference were a great improvement over pre-existing law; uniformity and certainty of commercial laws were objectives well, if imperfectly, served by the adoption of the acts. But by the late 1930's there was a strong movement afoot to improve the laws regulating interstate commercial transactions. A Federal Bill of Lading Act, modeled on the uniform act, had been adopted in 1916, and it was proposed that Congress adopt a Federal Sales Act which had been prepared by counsel for the Merchants of New York. In 1940, the Conference began work on a Revised Uniform Sales Act. It was soon decided, however, that much more satisfactory results might be obtained by thorough revision of all the uniform commercial legislation. Thus, the Conference embarked on the drafting of the Uniform Commercial Code.

The Conference first called upon the services of the American Law Institute. This is a distinguished organization composed of judges,

scholars, and lawyers which is devoted to the improvement of American Law. The American Law Institute had just completed a twenty-nine volume Restatement of American Law, a definite work which has been cited by state and federal courts in over 24,000 cases. In 1944, the Uniform Commercial Code became the joint project of the two eminent organizations. Reporters, who were for the most part distinguished scholars, were appointed to draft various parts of the Code, with the assistance of groups of advisors which included other scholars, judges, and practicing lawyers. A grant of \$275,000 was received from the Falk Foundation of Pittsburgh and another \$100,000 was raised by contributions of lawyers and business firms. This money was used to defray travel and stenographic expenses; none of the persons working on the Code were compensated for their services.

A tentative draft of the Code was submitted to the membership of the American Law Institute and was subjected to several complete revisions by that organization. The final draft resulting from the American Law Institute proceedings was then submitted to interested trade associations, bankers' associations, warehousemen, railroads, and others likely to be affected by the Code for their study and comment. In 1950, the American Bar Association undertook a study of the Code. The American Bar Association House of Delegates approved the Code in 1951. On the basis of the comments of all these organizations, and on the basis of the experience of lawyers who tried drafting under the Code, a final revision was completed by the Reporters and was promulgated by the Sponsors in 1952. It was promptly enacted in Pennsylvania, and was proposed for enactment in many other states.

These events prompted a flood of literature on the subject of the new Code. Most of the comment was favorable, but there were at least two dissents. Professor Beutel of the University of Nebraska accused the American Law Institute and the Commission of "selling out to the bank lobby." On the other hand, the General Counsel of the Chase National Bank, Emmett F. Smith, raised a host of objections and encouraged bankers everywhere to resist the enactment of the Code. These criticisms and others evoked the Commission's appointment of an Editorial Board which reviewed the criticisms and published a Supplement which recommended some further changes in the Code and replied to some of the criticisms which it rejected.

In 1953, the New York Legislature referred the Code to the New York Law Revision Commission, which employed 20 consultants to make a study which was conducted through 1955. After extensive public hearings and independent research conducted for three years, at a cost of over \$300,000, the Law Revision Commission published its report in 1956. It concluded that the objectives of the Code project were desirable and attainable, but that the Code was "not satisfactory in its present form."

The sponsors of the Code thereupon conducted further study and made a number of changes in the statute in response to the criticisms offered by the Law Revision Commission. A new 1957 Draft of the Code was prepared. In this form, the Code has been enacted in Massachusetts, Kentucky, Connecticut, and Pennsylvania. It is being considered for enactment in many other states. Most of the specific objections raised by the Law Revision Commission have been met, but the personnel of the Commission has been changed and no action was taken on the Code in New York at the 1959 Session of the Legislature.

In its present form, the Uniform Commercial Code is the product of a tremendous expenditure of money and the time of many of the most able lawyers, judges, scholars, and businessmen in the United States. It is the most thoroughly considered statute ever proposed for enactment. It is sponsored by the two most eminent and responsible agencies for law reform in the country. And, in 1958, the Wyoming Bar Association resolved to urge its adoption in our state.<sup>1</sup>

At the 1959 Session of the Wyoming Legislature, the Uniform Commercial Code was referred to the Legislative Research Committee for study and a report at the 1961 Session.<sup>2</sup> This report is presently in the process of preparation by members of the faculty of the College of Law of the University of Wyoming. (This foreword is in part a reproduction of the first chapter of that report.) Inasmuch as legislative consideration of the Code appears imminent, the Wyoming Law Journal is with this issue embarking on a program of informing the Bar as to its contents and effect on existing Wyoming law. The student notes which follow this foreword are narrow in scope and present examples of the application of the Code to several rather difficult problems. This foreword will seek to introduce readers to the scope and organization of the Code and to its general provisions. Tentatively scheduled for publication in the third issue of this volume of the Journal are two articles, one by Professor E. George Rudolph covering Article 9, and one by the present writer describing Articles 3, 4, 5, and 8. The balance of the Code will be reviewed in the first issue of Volume 15.

The Code is divided into nine substantive Articles. (Article 10 is the repealer provision.) Article 1 contains the general provisions pertaining to matters covered by the other Articles and also some 46 definitions of terms used throughout the Code. Article 2 is a revision of the old Uniform Sales Act which was adopted in Wyoming in 1917.<sup>3</sup> Article 3 would replace the Uniform Negotiable Instruments Law, which was adopted in Wyoming in 1905.<sup>4</sup> Article 4 concerns bank deposits and collections; it is not successor to any uniform act, but would replace a number of special

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1. 13 Wyo. L. J. 120 (1959).

2. Chapter 187, S.L. of Wyoming, 1959.

3. Wyo. Comp. Stat. §§ 41-101 to 41-609 (1945), WS Tit. 34, c. 13.

4. Wyo. Comp. Stat. §§ 40-101 to 40-1707 (1945), WS Tit. 13, c. 13.

local statutes<sup>5</sup> and the Bank Collection Code, a statute which was proposed for enactment in all states by the American Bankers Association and which was enacted in several, including Wyoming in 1931.<sup>6</sup> Article 5 is completely new; it concerns letters of credit, a device for financial, commercial, and other transactions, which is much used in international trade. The use of letters of credit has developed without benefit of any guiding legislation and the Wyoming law of letters of credit is presently a void. Article 6 concerns bulk transfers; there has been no uniform act, but all states have adopted some legislation<sup>7</sup> protecting creditors against bulk transfers of inventories and Article 6 is intended to harmonize these laws. Article 7 pertains to documents of title and would replace the Uniform Warehouse Receipts Act which was adopted in Wyoming in 1917<sup>8</sup> and a local statute which defines the rights of parties to bills of lading.<sup>9</sup> The Uniform Bills of Lading Act was never enacted in Wyoming. Article 8 would govern transactions in investment securities. Insofar as it relates to negotiable bonds, it would replace the Uniform Negotiable Instruments Law, but otherwise it is a revision of the Uniform Stock Transfer Act which was not enacted in Wyoming until 1945.<sup>10</sup> Article 9 concerns security transactions and would replace existing legislation on chattel mortgages,<sup>11</sup> conditional sales,<sup>12</sup> trust receipts,<sup>13</sup> and account receivable financing.<sup>14</sup> As a first introduction to the sort of changes which the Code would bring to the vast expanse of laws which it would thus replace, it may be useful here to consider some of the general provisions of Article 1.

The Code, like its predecessors, is concerned, for the most part with technical rules governing the mechanics of commercial transactions. To be sure, some policy decisions are necessarily made in the formulation of such rules, but so far as appears the Code contains no policy decisions which would significantly prejudice the interests of any special group. This policy neutrality is largely assured at the outset by Section 1-102 which affirms the general right of parties to commercial transactions to fix their own rights and liabilities by contract and declares it to be a policy of the Code "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties." Freedom of contract has never been an absolute freedom, however, and it is not absolute under the Code.

The most important existing limitation on freedom of contract is the common law doctrine of consideration. Section 1-107 of the Code makes

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5. Wyo. Comp. Stat. §§ 35-148 to 35-157 (1945), WS 13-29 to 13-38.
  6. Wyo. Comp. Stat. c. 41, Art. 7 (1945), WS Tit. 13, c. 3, Art. 9.
  7. Wyo. Comp. Stat. c. 41, Art. 7 (1945), WS Tit. 34, c. 14.
  8. Wyo. Comp. Stat. §§ 42-101 to 42-504 (1954), WS Tit. 34, c. 20.
  9. Wyo. Comp. Stat. c. 39, Art. 1 (1945), WS Tit. 34, c. 18.
  10. Wyo. Comp. Stat. c. 44, Art. 5 (1945), WS Tit. 17, c. 6, Art. 2.
  11. Wyo. Comp. Stat. c. 59, Art. 1 (1945), WS Tit. 34, c. 16.
  12. Wyo. Comp. Stat. c. 41, Art. 8 (1945), WS Tit. 34, c. 15.
  13. Wyo. Comp. Stat. c. 44, Art. 5 (1945), WS Tit. 34, c. 19.
  14. Wyo. Comp. Stat. c. 39, Art. 14 (1945), WS Tit. 34, c. 17.

an inroad into this doctrine by providing that "any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration" by a written renunciation "signed and delivered" by the aggrieved party. This is an extension of the principle embodied in Section 122 of the Uniform Negotiable Instruments Law<sup>15</sup> and is intended to encourage and protect private settlements of commercial disputes. It is thought that the requirement of a writing is sufficient protection of the aggrieved merchant against unwise generosity; it is, in a sense, a throwback to the old common law seal, for prior to the abolition of the seal there was no requirement of consideration for instruments under seal.

Section 1-203 states another principle which is in derogation of absolute freedom of contract: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." This right to good faith performance cannot be bargained away. Specific examples of the application of this principle are found elsewhere in the Code. One such instance is found in Section 1-208 which provides that a creditor who retains the right to accelerate at will must exercise this power "in good faith" belief that the prospect for payment has been impaired. This provision is consistent with an assumption made by our Supreme Court to the effect that a creditor may not exercise a power of acceleration capriciously for the purpose of embarrassing his debtor.<sup>16</sup>

There are other limitations on freedom of contract to be found in the Code. Some rights cannot be waived. These will be discussed where pertinent, but it may be observed here that these limitations are largely narrow limitations and are often declaratory of existing law, or at least of a "majority view."

Section 1-105 is the central Code provision dealing with the problem of the choice of law controlling transactions which take place in more than one state. All lawyers recognize these problems of choice of law as being among the most difficult they must face. In no other field of law are the rules more uncertain or the alternatives more hotly disputed among the authorities. Because of the absence of Wyoming case law and the extent of dispute elsewhere, it is very difficult to predict the outcome, in our courts, of even the simplest problems of choice of law. For this reason, almost any codification of law in this field would be beneficent. The Code solution is to permit the parties freedom to choose the law which will control their rights and liabilities so long as the transaction bears some relation to the law chosen, and then provides a number of rules to guide courts in making the choice in cases in which the parties have failed to do so.

Section 1-206 pertains to the requirement of a writing for contracts

15. Wyo. Comp. Stat. § 40-804 (1945), WS 13-408. *Jones v. Wettlin*, 39 Wyo. 331, 271 Pac. 217 (1928).

16. See *Hein v. Mercante*, 57 Wyo. 81, 113 P.2d 940 (1941).

for the sale of personal property other than goods or securities. A contract for the sale of choses in action, contract or royalty rights, or intangibles for more than \$5,000 is not enforceable unless in writing. Choses in action are presently covered by the Uniform Sales Act and the value limit imposed by the Wyoming Sales Act is \$50;<sup>17</sup> this section raises that limit a hundred fold. This is a desirable change for the requirement of a writing for small transactions which are customarily informal is more likely to be an instrument for perpetuating fraud than for preventing it. A sale of other intangibles is not presently within the statute of frauds in Wyoming and the extension of the requirement of a writing to include these kinds of transactions would also seem to be a desirable change in our law.

Section 1-201 harmonizes the terminology of the other Articles of the Code. These definitions do not in themselves effect any changes in existing law, but perhaps one, at least, needs mention here. A problem which runs through the whole of commercial law is the problem of the protection to be afforded the good faith purchaser of goods, documents of title, or commercial paper from one who is not the owner or with respect to which some security interest is outstanding. Such a "purchaser" is not protected unless he has given "value" for the goods or other subject of sale. The term "value" is presently defined in all of the uniform commercial acts except the Uniform Conditional Sales Act; these definitions all include the words "value is any consideration sufficient to support a simple contract,"<sup>18</sup> and this language is carried forward into the Code.

This language seems to mean that one who has made a binding promise to pay, has given value, even though he is still free to avoid liability on that promise. Some dissent has been registered, however, on the ground that the language cannot be taken to mean that one who can simply repudiate his promise to his transferor need not do so, but may stand on his favored position as a good faith purchaser. The Code has resolved all doubt against this dissent and defines value to include binding commitments to extend credit or for the immediate extension of credit. This seems sound. The claimant may yet reach the unpaid purchase price in the hands of the purchaser, even though he may not set aside the sale. This is generally an adequate remedy and the alternative rule forces the good faith purchaser to risk the merit of the claim asserted: if he believes the claimant and repudiates his promise, he will be liable for breach if the claim is erroneous; if he disbelieves the claimant and performs his promise, he will be liable as a converter of the goods if the claim proves valid.

Section 54 of the Negotiable Instruments Law<sup>19</sup> nevertheless adopts the rule of the dissent noted above: "Where the transferee receives notice

17. Wyo. Comp. Stat. § 41-104 (1945), WS 34-169.

18. Wyo. Comp. Stat. §§ 40-202, 44-522(10), 41-606(1), 59-401, 42-503 (1945), WS 13-310, 17-100(10), 34-158(1), 34-297, 34-316.

19. Wyo. Comp. Stat. § 40-404 (1945), WS 13-340.

of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him." This Section presented a very difficult problem in cases in which the transferee had himself issued a negotiable instrument in payment for the instrument in dispute. Does Section 54 require the transferee to bring suit to enjoin the transfer of his note or draft to a third party? In *Pennoyer v. Dubois State Bank*,<sup>20</sup> our court held that this was an unreasonable burden to place upon a good faith purchaser and was not contemplated by Section 54. This decision was inconsistent with some earlier cases in other courts, but seems to impose a sound limitation on the questionable rule of Section 54. The Uniform Commercial Code preserves the rule of Section 54, but expressly adopts the limitation imposed upon it by the decision in the *Pennoyer* case.<sup>21</sup> One technical improvement is made by the omission of the language about value being any consideration sufficient to support a simple contract; this definition is expressly inapplicable to negotiable instruments by the terms of Section 1-201 (44). Thus the inconsistency between Sections 25<sup>22</sup> and 54 of the Negotiable Instruments Law is removed.

The provisions of Article 1 which have been described are indicative of the general tenor and effect of the entire Code. The overwhelming bulk of the Code is declaratory of existing law and its primary moving purpose is not substantive change, but simply clarification of existing law. The Code hopes to make commercial law sufficiently certain that lawyers can advise their clients with a degree of assurance not now possible. This purpose is served in three major ways: (1) new coverage is added to resolve questions left open by existing codifications, (2) conflicts which have arisen in the interpretation of existing uniform laws are resolved, and (3) old rules are re-written in comprehensible language where necessary and are re-organized and cross-referenced so as to assure ready discovery of all the provisions which may be pertinent to any particular problem. And this goal of certainty is also served by provisions like Section 1-203 which was described above, which afford a degree of flexibility where that is needed. The absence of such provisions under existing statutes has led to many warped constructions of language which were pressed upon courts by the occasional harshness of an unbending statute.

To be sure, some changes would be wrought by the Code. Most of these, however, are narrow in scope, and are not controversial in content. Many of them represent a departure from old conceptualism—a retreat from the practice of applying concepts such as "title to goods" with ruthless logic regardless of impractical, unfair, and unmanageable results produced. As we have indicated, these changes will be the subject of other articles which will appear in later issues of the Journal.

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20. 35 Wyo. 319, 249 Pac. 795 (1926).

21. Uniform Commercial Code §§ 3-302, 4-208, 4-209.

22. Wyo. Comp. Stat. § 40-202 (1945), WS 13-310.